UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-62770-CIV-MARRA
(09-60212-CR-MARRA)

GREGORY WELCH,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

FINAL JUDGMENT

For the reasons stated in the Report of the Magistrate Judge (DE 17) and upon independent de novo review of the file, and over the objections having been filed (DE 18), it is **ORDERED AND ADJUDGED** as follows:

1) The Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge. The petition to vacate pursuant to 28 U.S.C. § 2255 is **DENIED**.

2) Under Rule 11(a) of the Rules Governing Section 2255 Proceedings in the United States District Courts, this Court must issue or deny a certificate of appealability when entering a final order adverse to the applicant. Because the Court is adopting the Magistrate Judge's Recommendation denying the motion to vacate brought under 28 U.S.C. § 2255, the Court must consider whether to issue or deny the certificate of appealability at this time.

In order for this court to grant a COA, Movant must make a "substantial

showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), such that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further," Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). The Court concludes under Slack that Movant cannot show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. Therefore, the Court **DENIES** a certificate of appealability. The Court notes that under Rule 22(b)(1) of the Federal Rules of Appellate Procedure, Movant may seek a certificate of appealability from the U.S. Court of Appeals for the Eleventh Circuit.

3) All motions not otherwise ruled upon are **DISMISSED AS MOOT**

4) The case is **CLOSED**.

DONE AND ORDERED in chambers at West Palm Beach, Palm Beach County, Florida, this 8th day of December 2014.

KENNETH A. MARRA
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO 13-62770-Civ-MARRA
(09-60212-Cr-MARRA)
MAGISTRATE JUDGE P A. WHITE

GREGORY WELCH,

Movant,

v

UNITED STATES OF AMERICA,

Respondent
_____/

REPORT OF
MAGISTRATE JUDGE

I Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U S.C §2255, challenging the constitutionality of his conviction and sentence for possession of a firearm and ammunition in and affecting interstate and foreign commerce entered following a guilty plea in case no 09-60212-Cr-Marra

This Cause has been referred to the Undersigned for consideration and report pursuant to 28 U.S.C §636(b)(1)(B) and Rules 8 and 10 Governing Section 2255 Cases in the United States District Courts

The Court has reviewed the movant's motion (Cv-DE#1), together with the government's response (Cv-DE#7) to this court's order to show cause with multiple exhibits, the movant's traverse (Cv-DE#15),[1] the Presentence Investigation Report ("PSI"), the court's

[1]The movant's traverse was also filed on CM/ECF at Cv-DE#14, but it has pages missing The complete traverse is docketed on CM/ECF at Cv-DE#15

Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file, including the change of plea and sentencing transcripts

Construing the movant's §2255 motion liberally as afforded *pro se* litigants pursuant to Haines v. Kerner, 404 U S 519 (1972), in his motion to vacate (Cv-DE#1), movant challenges the voluntariness of his plea and his ensuing sentence as an armed career criminal Movant alleges he was denied effective assistance of counsel, where his lawyer allowed him to be sentenced as an armed career criminal thereby making his plea not knowing and voluntary (Cv-DE#1:4)

II Factual Background and Procedural History

A. Facts of the Offense[2]

The stipulated factual proffer reveals as follows On March 17, 2009, law enforcement officers searched movant's apartment (Cr-DE#43) At that time, they discovered a loaded Lorcin, Model L380, 380-caliber, semi-automatic pistol, bearing serial number 532504, in the attack space of the apartment (Id.) The firearm was loaded with six rounds of ammunition, five of which were Winchester, 380-caliber ammunition, and one was a Remington, 380-caliber bullet (Id.) Movant further stipulated that the firearm and all of the ammunition had traveled in interstate or foreign commerce (Id.) Next, he agreed that he was a previously convicted felon. (Id.)

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[2]The facts of this case have been obtained from the factual proffer executed by the movant and made part of the Rule 11 change of plea proceeding. (Cr-DE#43:Factual Proffer; Cr-DE#55:Change of Plea/Sentencing Transcript)

B Indictment, Pre-trial Proceedings, Conviction, Sentencing, and Direct Appeal

On August 20, 2009, the movant was charged by Indictment with felon in possession of a firearm and ammunition, in violation of 18 U S C §922(g)(1) [3] (Cr-DE#1; Cv-DE#7:Ex.2) On March 29, 2010, the movant filed a pretrial motion to suppress evidence, arguing that the search was unlawful and the evidence seized as a result therefrom should be suppressed. (Cr-DE#16) Following an evidentiary hearing, the court entered an order denying the motion. (DE#31)

On June 18, 2010, movant entered into a negotiated plea agreement, in which he agreed to plead guilty as charged, acknowledging that the firearm and ammunition were found in his apartment, but preserving his right to appeal the court's denial of his motion to suppress (Cr-DE#54) At that time, the terms of the plea agreement called for a maximum sentence of up to 10 years in prison, for violation of 18 U S C §922(g)(1) (Cr-DE#54:8)

However, on September 8, 2010, movant agreed to vacate his prior plea, and in fact, executed a revised, negotiated written plea agreement, agreeing to plead guilty as charged. (Cr-DE#43) The terms of the agreement were modified in part to reflect movant's agreement and understanding that he faced a minimum of 15 years and up to a maximum of life imprisonment, for violation of §922(g) (Id.:2) The movant acknowledged and understood that the court would impose sentence after considering the advisory

[3]The maximum sentence exposure for being a felon in possession of a firearm, in violation of 18 U.S.C. §922(g)(1), is ten years in prison. However, if a felon in possession has three prior convictions for violent felonies or serious drug offenses, then the Armed Career Criminal Act, 18 U.S.C §924(e), requires a minimum sentence of 15 years imprisonment.

guidelines, based in part on a PSI, which would be prepared after the plea is entered (Id.:2-3) The movant further acknowledged that the court was not bound to impose a guideline sentence, and was permitted to tailor the sentence in light of other statutory concerns, which may be more or less severe than the guidelines (Id.)

Movant understood that the court had the authority to impose up to the statutory maximum authorized by law for the offense of conviction, and that he could not withdraw his plea solely as a result of the sentence imposed. (Id.) In fact, movant understood that the sentence had not yet been determined by the court, and any estimate of the probable sentencing range or ultimate sentence from either defense counsel, the government, or the probation office was a prediction, not a promise, and therefore, not binding on the government, the probation office, or the court (Id.:6-7) He also indicated he had entered into the plea freely and voluntarily, and that no threats or promises, other than as contained in the written agreement, were made to induce him to change his plea to guilty (Id.:7)

Although acknowledging it would not be binding on the probation officer or the court, the parties agreed to jointly recommend up to a three level reduction to movant's base offense level based on his timely acceptance of responsibility (Id :4-5) As part of the modified agreement, the government also consented to the movant's entry of a conditional guilty plea, allowing movant to reserve the right to appeal the denial of his motion to suppress physical evidence (Id.:8)

Movant also stated that there was sufficient evidence to

convict him of the charged offense, as follows (Id.:5-6) On March 17, 2009, his apartment was searched by law enforcement (Id.) At that time, they discovered in the attic space a loaded Lorcin, Model L380, 380-caliber semi-automatic pistol, bearing serial number 532504 (Id.) The firearm contained six rounds of ammunition. (Id.) Five of the rounds were Winchester and one was a Remington. (Id.)

On September 17, 2010, movant appeared for a new change of plea proceeding (Cr-DE#55) At that time, the government explained that when movant initially entered his change of plea in June 2010, neither party had contemplated that the movant qualified as an armed career criminal (Id.:2) As a result, the movant was not advised that his maximum exposure was significantly greater than 10 years (Id.:2-3) As a result, the government stated that the parties had recently executed another written plea agreement similar to the prior agreement (Id.) The new agreement was modified to reflect the fact that movant faced a 15-year minimum mandatory and up to a term of life imprisonment for the charged offense (Id.:3) Further, the modified agreement permitted movant to enter a conditional guilty plea, omitted the appellate waiver contained in the prior agreement, thereby enabling him to appeal the denial of his suppression motion, along with the lawfulness of the sentence to be imposed. (Id.:3) The court then asked defense counsel whether the government's representations were correct, to which counsel responded that the movant potentially faced an enhanced sentence as an armed career criminal, but movant was reserving the right to litigate the validity of the enhancement at sentencing (Id.)

Thereafter, the district court conducted a careful and

meticulous plea colloquy pursuant to Fed.R.Cr.P. 11 (Cr-DE#55) After movant was given the oath, he was cautioned by the court that if he made any false statements during the proceedings, it could be used against him in a prosecution for perjury (Id.:3). Movant then provided background information regarding his age, educational background, and whether he could read and write English. (Id.:4-5)

Movant understood and agreed to set aside his previously entered guilty plea, and to go forward with a new, modified written plea agreement (Id.:6) Movant acknowledged that the new plea agreement allowed him to appeal the sentence imposed, as well as, the court's ruling on movant's motion to suppress (Id.) When asked if, in fact, he wanted to set aside the prior plea, and enter into the new plea agreement, movant responded that he did. (Id.) Movant indicated he had consulted with his attorney about this decision, and they were both in agreement on proceeding with the new plea agreement (Id.) When asked again whether he believed the case should be resolved based on the new agreement with the government, movant indicated that it should. (Id.:8)

Movant further acknowledged reviewing and discussing with counsel the Indictment, along with the government's evidence against him. (Id.:7) He also indicated he discussed possible defenses with counsel, and acknowledged counsel had done more than he had anticipated for him, and had provided more than competent advice (Id.:8) He stated there was nothing further he had wanted done by counsel to defend against the charge (Id.)

Movant testified that he read the new agreement and then fully and completely discussed it with his attorney (Id.:8) He denied any one threatening or forcing him to change his plea from not

guilty to guilty, stating he was doing so freely and voluntarily (Id.:9) Next, again acknowledged the charge against him, as set forth in the Indictment, and further understood that given his criminal history, he may be subject to an enhanced sentence, exposing him to a 15-year minimum and up to a maximum of up to life imprisonment (Id.:10) He acknowledged that the sentence would be imposed after the court considered the advisory guideline sentence, as set forth in the PSI, which had already been prepared. (Id.:11-12) He also acknowledged that after the Rule 11 proceeding, there would be a discussion with the court concerning his disagreement with the contents of the PSI, and in particular, with the recommendation that movant receive an enhanced sentence as an armed career criminal (Id.:12) Movant further understood that his guideline range would be reduced three levels based on his timely acceptance of responsibility (Id.:13) He also acknowledged that the guidelines were not binding or mandatory, and that the court would be able to fashion a sentence above or below the guideline range. (Id.:15-16)

Movant also acknowledged and agreed with the accuracy of the facts as set forth in paragraph 10 of the written plea agreement (Id.:13) He indicated those facts support the charge to which he was pleading guilty (Id.:14) He also acknowledged his agreement to forfeit any claim of ownership or title to the firearm and ammunition seized in connection with the case (Id.)

Notably, movant understood he was entering into a conditional plea because he had reserved the right to appeal the denial of his motion to suppress, along with the lawfulness of the sentence to be imposed. (Id.:14) Movant again denied being made any promises or representations, other than set forth in the plea agreement as to

the ultimate sentence to be imposed. (Id.:16)

Movant acknowledged and understood that by pleading guilty, he was waiving his right to a jury trial and to call witnesses, present evidence, testify on his own behalf, etc (Id.:18-20) Movant further understood that if the court accepted the plea, he would also lose valuable civil liberties, and that the plea could have additional collateral consequences, including deportation, if he were not a United States citizen. (Id.:20) Next, when asked by the court how he wished to plead, movant stated, "Guilty, sir " (Id.:20)

As a result of the foregoing, the court found the movant was fully competent and capable of entering into an informed plea, that he was aware of the nature of the charge and consequences of the plea, that his plea was knowing and voluntary, and supported by an independent basis in fact as to each of the essential elements of the offense. (Id.:21) Thereafter, the court accepted movant's plea, and adjudicated him guilty of the offense charged in the Indictment (Id.)

The PSI prepared for sentencing which reveals as follows The probation officer set the base offense level at 24, pursuant to U S.S.G §2K2 1(a)(4)(A), because the offense of conviction involved possession of a firearm by a convicted felon who had committed the offense of conviction after having at least two prior felony convictions of crimes of violence. (PSI ¶15) However, the base offense level was then increased to a level 33 because the movant was subject to an enhanced sentence, pursuant to U S S.G. §4B1 4(a), as an armed career criminal (PSI ¶21) Three levels were deducted from the base offense level based on movant's timely

acceptance of responsibility, resulting in a total adjusted offense level 30 (PSI ¶¶21-24)

Next, the probation officer determined movant had a total of 14 criminal history points, resulting in a criminal history category VI (PSI ¶¶40-41) The criminal history category remained the same even with the armed career criminal enhancement, pursuant to U S S.G. §4B1 4(c)(3) (PSI ¶42) Based on a total offense level 30 and a criminal history category VI, at the low end, movant's total advisory guideline exposure was 168 to 210 months in prison. (PSI ¶86; Cr-DE#55:22) However, statutorily, movant was facing a minimum mandatory term of imprisonment of 180 months in prison (Cr-DE#55:22)

Defense counsel, having previously filed objections to the PSI's determination that movant qualified for an enhanced sentence as an armed career criminal (Cr-DE#s37-40), renewed the objections at sentencing (Cr-DE#55:23-40) After considering the statement of all parties, the PSI containing the advisory guidelines, along with the 18 U S.C §3553(a) statutory factors, the court sentenced petitioner to the statutory minimum mandatory term of 180 months imprisonment, to be followed by a term of 3 years supervised release (Cr-DE#55:39-40; Cr-DE#45)

Movant appealed, challenging the denial of his motion to suppress, as well as, the constitutionality of his enhanced sentence as an armed career criminal See United States v. Welch, 683 F 3d 1304 (11th Cir 2012); (Cr-DE#69) On June 13, 2012, the Eleventh Circuit *per curiam* affirmed the denial of the suppression motion, along with the enhanced sentence, in a published opinion. United States v. Welch, supra. Certiorari review was denied on

January 7, 2013 Welch v. United States, __ U S ___, 133 S Ct 913, 184 L.Ed.2d 702 (2013); (Cr-DE#71)

For purposes of the federal one-year limitations period, the judgment of conviction in the underlying criminal case became final at the latest on **January 7, 2013,** when certiorari review was denied by the United States Supreme Court [4] Less than one year later, the movant returned to this court filing the instant motion to vacate with supporting memorandum, pursuant to 28 U S C. §2255, on **December 9, 2013.**[5] (Cv-DE#s1,2)

III Standard of Review

Pursuant to 28 U S.C §2255, a prisoner in federal custody may move the court which imposed sentence to vacate, set aside or correct the sentence if it was imposed in violation of federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is

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[4]The Supreme Court has stated that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); accord, United States v. Kaufman, 282 F.3d 1336 (11th Cir 2002) Once a judgment is entered by a United States court of appeals, a petition for writ of certiorari must be filed within 90 days of the date of entry The 90 day time period runs from the date of entry of the judgment rather than the issuance of a mandate. Sup.Ct.R. 13; see also, Close v. United States, 336 F.3d 1283 (11th Cir 2003)

[5]The §2255 and supporting memorandum are neither signed nor dated Although the exact date it was mailed cannot be determined, the undersigned has utilized the Clerk's receipt date for purposes of the filing date. It is worth noting that due to lack of verification, the motion, as currently filed, is subject to dismissal. See Rule 2(b)(5) of the Rules Governing §2255 Proceedings in District Courts. Since movant cannot prevail on any of the claims presented, the undersigned has addressed the merits of the claims in the alternative. By separate order, the undersigned has directed movant to verify the §2255 motion under penalty of perjury His failure to do so prior to the district court's consideration of this Report and ensuing Order may result in dismissal of this action on that basis, in the alternative.

otherwise subject to collateral attack. 28 U S C §2255 In determining whether to vacate a movant's sentence, a district court must first determine whether a movant's claim is cognizable under Section 2255 See Lynn v. United States, 365 F 3d 1225, 1232-33 (11th Cir 2004)(stating that a determination of whether a claimed error is cognizable in a Section 2255 proceeding is a "threshold inquiry"), cert. den'd, 543 U S 891, 125 S Ct 167, 160 L. Ed. 2d 154 (2004) It is well-established that a Section 2255 motion may not be a substitute for a direct appeal Id. at 1232 (citing United States v. Frady, 456 U.S 152, 165, 102 S Ct. 1584, 1593, 71 L.Ed.2d 816 (1982))

The Eleventh Circuit promulgated a two-part inquiry that a district court must consider before determining whether a movant's claim is cognizable First, a district court must find that "a defendant must assert all available claims on direct appeal " Lynn, supra (citing Mills v. United States, 36 F 3d 1052, 1055 (11th Cir 1994)) Second, a district court must consider whether the type of relief the movant seeks is appropriate under Section 2255 This is because "[r]elief under 28 U S.C §2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." Lynn, 365 F 3d at 1232-33 (quoting Richards v. United States, 837 F 2d 965, 966 (11th Cir 1988)(internal quotations omitted))

If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U S C §2255 To obtain

this relief on collateral review, a petitioner must "clear a significantly higher hurdle than would exist on direct appeal " Frady, 456 U S at 166, 102 S.Ct at 1584 (rejecting the plain error standard as not sufficiently deferential to a final judgment

Under Section 2255, unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," the court shall "grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." However, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing " Schriro v. Landrigan, 550 U S 465, 474, 127 S Ct 1933, 1940, 167 L.Ed.2d 836 (2007) See also Aron v. United States, 291 F 3d 708, 715 (11th Cir 2002)(explaining that no evidentiary hearing is needed when a petitioner's claims are "affirmatively contradicted by the record" or "patently frivolous") As indicated by the discussion below, the motion and the files and records of the case conclusively show that movant is entitled to no relief, therefore, no evidentiary hearing is warranted

In addition, the party challenging the sentence has the burden of showing that it is unreasonable in light of the record and the §3553(a) factors United States v. Talley, 431 F 3d 784, 788 (11th Cir 2005) The Eleventh Circuit recognizes "that there is a range of reasonable sentences from which the district court may choose," and ordinarily expect a sentence within the defendant's advisory guideline range to be reasonable Id.

A. Guilty Plea Principles

It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea Boykin v. Alabama, 395 U S 238, 243 (1969) Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea Brady v. United States, 397 U S 742, 748 (1970) See also United States v. Ruiz, 536 U S 622, 629 (2002); Hill v. Lockhart, 474 U S 52, 56 (1985); Henderson v. Morgan, 426 U S 637, 645 n 13 (1976) To be voluntary and knowing, (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea. United States v. Moriarty, 429 F 3d 1012, 1019 (11th Cir 2005); United States v. Mosley, 173 F 3d 1318, 1322 (11th Cir 1999)

After a criminal defendant has pleaded guilty, he may not raise claims relating to the alleged deprivation of constitutional rights occurring prior to the entry of the guilty plea, but may only raise jurisdictional issues, United States v. Patti, 337 F 3d 1317, 1320 (11th Cir 2003), cert. den'd, 540 U S 1149 (2004), attack the voluntary and knowing character of the guilty plea, Tollett v. Henderson, 411 U S 258, 267 (1973); Wilson v. United States, 962 F 2d 996, 997 (11th Cir 1992), or challenge the constitutional effectiveness of the assistance he received from his attorney in deciding to plead guilty, United States v. Fairchild, 803 F 2d 1121, 1123 (11th Cir 1986) To determine that a guilty plea is knowing and voluntary, a district court must comply with

Rule 11 and address its three core concerns: "ensuring that a defendant (1) enters his guilty plea free from coercion, (2) understands the nature of the charges, and (3) understands the consequences of his plea." Id.; see also, United States v. Frye, 402 F 3d 1123, 1127 (11th Cir 2005)(*per curiam*); United States v. Moriarty, 429 F 3d 1012 (11th Cir 2005) [6]

In other words, a voluntary and intelligent plea of guilty made by an accused person must therefore stand unless induced by misrepresentations made to the accused person by the court, prosecutor, or his own counsel Brady v. United States, 397 U S 742, 748 (1970) If a guilty plea is induced through threats, misrepresentations, or improper promises, the defendant cannot be said to have been fully apprised of the consequences of the guilty plea and may then challenge the guilty plea under the Due Process Clause See Santobello v. New York, 404 U S 257 (1971)

B. Ineffective Assistance of Counsel Principles

Because the movant suggests in the motion that counsel rendered ineffective assistance, this Court's analysis begins with the familiar rule that the Sixth Amendment affords a criminal

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[6] In Moriarty, the Eleventh Circuit specifically held as follows:

> [t]o ensure compliance with the third core concern, Rule 11(b)(1) provides a list of rights and other relevant matters about which the court is required to inform the defendant prior to accepting a guilty plea, including: the right to plead not guilty (or persist in such a plea) and to be represented by counsel; the possibility of forfeiture; the court's authority to order restitution and its obligation to apply the Guidelines; and the Government's right, in a prosecution for perjury, to use against the defendant any statement that he gives under oath.

Id.

defendant the right to "the Assistance of Counsel for his defense " U S CONST amend. VI To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate both (1) that counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U S 668, 687, 694 (1984); Harrington v. Richter, ___ U S ___, 131 S.Ct 770, 788 (2011) See also Premo v. Moore, ___ U S ___, 131 S.Ct 733, 739-740 (2011); Padilla v. Kentucky, 559 U S 356, 367, 130 S Ct 1473, 1482, 176 L Ed.2d 284 (2010) If the movant cannot meet one of Strickland's prongs, the court does not need to address the other prong. Strickland, 466 U S at 697, 104 S Ct 2069 (explaining a court need not address both prongs of Strickland if the defendant makes an insufficient showing on one of the prongs) See also Butcher v. United States, 368 F 3d 1290, 1293 (11th Cir 2004); Brown v. United States, 720 F 3d 1316 (11th Cir 2013)

To show counsel's performance was unreasonable, a defendant must establish that "no competent counsel would have taken the action that his counsel did take " Gordon v. United States, 518 F 3d 1291, 1301 (11th Cir 2008)(citations omitted); Chandler v. United States, 218 F 3d 1305, 1315 (11th Cir 2000) With regard to the prejudice requirement, the movant must establish that, but for counsel's deficient performance, the outcome of the proceeding would have been different Strickland, 466 U.S at 694 For the court to focus merely on "outcome determination," however, is insufficient; "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." Lockhart v. Fretwell, 506 U S 364, 369-70, 113 S Ct 838, 122 L.Ed.2d 180 (1993); Allen v. Sec'y, Fla. Dep't of Corr's,

611 F 3d 740, 754 (11th Cir 2010) A defendant therefore must establish "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Lockhart, 506 U S at 369 (quoting Strickland, 466 U S at 687)

In the context of a guilty plea, the first prong of Strickland requires petitioner to show his/her plea was not voluntary because he/she received advice from counsel that was not within the range of competence demanded of attorneys in criminal cases, while the second prong requires petitioner to show a reasonable probability that, but for counsel's errors, he/she would have entered a different plea Hill, 474 U S at 56-59 If the petitioner cannot meet one of Strickland's prongs, the court does not need to address the other prong Dingle v. Sec'y for Dep't of Corr's, 480 F 3d 1092, 1100 (11th Cir), cert. den'd, 552 U S 990 (2007); Holladay v. Haley, 209 F 3d 1243, 1248 (11th Cir), reh'g and reh'g en banc den'd by, Holladay v. Haley, 232 F 3d 217 (11th Cir), cert. den'd, 531 U.S 1017 (2000)

However, a defendant's sworn answers during a plea colloquy must mean something Consequently, a defendant's sworn representations, as well as representation of his/her lawyer and the prosecutor, and any findings by the judge in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings " Blackledge v. Allison, 431 U S 63, 73-74 (1977); United States v. Medlock, 12 F 3d 185, 187 (11th Cir), cert. den'd, 513 U.S 864 (1994); United States v. Niles, ___ F 3d ___, 2014 WL 1876276 (11th Cir May 12, 2014)(unpublished) [7]

[7] "Unpublished opinion are not considered binding precedent, but they may be cited as persuasive authority " 11th Cir R. 36-2 The Court notes this same rule applies to other Fed. Appx. cases cited herein.

A criminal defendant is bound by his/her sworn assertions and cannot rely on representations of counsel which are contrary to the advice given by the judge. See Scheele v. State, 953 So 2d 782, 785 (Fla 4 DCA 2007) ("A plea conference is not a meaningless charade to be manipulated willy-nilly after the fact; it is a formal ceremony, under oath, memorializing a crossroads in the case. What is said and done at a plea conference carries consequences "); Iacono v. State, 930 So 2d 829 (Fla. 4 DCA 2006) (holding that defendant is bound by his sworn answers during the plea colloquy and may not later assert that he committed perjury during the colloquy because his attorney told him to lie); United States v. Rogers, 848 F 2d 166, 168 (11th Cir 1988) ("[W]hen a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false.")

Moreover, in the case of alleged sentencing errors, the movant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been less harsh due to a reduction in the defendant's offense level Glover v. United States, 531 U S. 198, 203-04, 121 S.Ct 696, 148 L.Ed.2d 604 (2001) A significant increase in sentence is not required to establish prejudice, as "any amount of actual jail time has Sixth Amendment significance." Id. at 203

Furthermore, a §2255 movant must provide factual support for his contentions regarding counsel's performance Smith v. White, 815 F 2d 1401, 1406-07 (11th Cir 1987) Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the Strickland test See Boyd v. Comm'r, Ala. Dep't of Corr's, 697 F 3d 1320, 1333-34 (11th Cir 2012); Garcia v. United States, 456 Fed.Appx. 804, 807 (11th Cir 2012) (citing Yeck v. Goodwin, 985

F 2d 538, 542 (11th Cir 1993)); Wilson v. United States, 962 F 2d 996, 998 (11th Cir 1992); Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir 1991), cert. den'd Tejada v. Singletary, 502 U.S 1105 (1992); Stano v. Dugger, 901 F 2d 898, 899 (11th Cir 1990) (citing Blackledge v. Allison, 431 U S 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)); United States v. Ross, 147 Fed.Appx. 936, 939 (11th Cir 2005)

Finally, the Eleventh Circuit has recognized that given the principles and presumptions set forth above, "the cases in which habeas petitioners can properly prevail are few and far between." Chandler, 218 F 3d at 1313 This is because the test is not what the best lawyers would have done or even what most good lawyers would have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. Dingle, 480 F 3d at 1099; Williamson v. Moore, 221 F 3d 1177, 1180 (11th Cir 2000) "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it '" Dingle, 480 F 3d at 1099 (quoting Adams v. Wainwright, 709 F 2d 1443, 1445 (11th Cir 1983)) The Sixth Circuit has framed the question as not whether counsel was inadequate, but rather counsel's performance was so manifestly ineffective that "defeat was snatched from the hands of probable victory " United States v. Morrow, 977 F 2d 222, 229 (6th Cir 1992)

IV Threshold Issues

The government concedes that this federal proceeding was instituted less than a year after movant's conviction became final

(Cv-DE#9) As will be recalled, movant's conviction became final at the latest on **January 7, 2013**, when certiorari review was finally denied by the United States Supreme Court For purposes of the AEDPA's one-year federal limitations period, the movant was required to file this motion to vacate within one year from the time the judgment became final, or no later than **January 7, 2014.** See Griffith v. Kentucky, 479 U S. 314, 321, n.6 (1986); see also, See Downs v. McNeil, 520 F 3d 1311, 1318 (11th Cir 2008)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F 3d 1286, 1289 n.1 (11th Cir 2007)(this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F 3d 1256, 1260-61 (10th Cir 2003); United States v. Marcello, 212 F 3d 1005, 1008-09 (7th Cir 2000)) Pursuant to the mailbox rule, movant's motion was filed on **December 9, 2013,** less than a year after his conviction became final Therefore the government's argument is correct and this federal petition is not time-barred.

V Discussion

In this federal habeas petition, movant argues that his guilty plea was not knowing and voluntary because his lawyer failed to inform him that he would be subject to an enhanced sentence as an armed career criminal (Cv-DE#1; Cv-DE#2:2) He claims that but for counsel's deficiency, he would not have accepted the 15-year plea and would have proceeded to trial (Cv-DE#2:Memo:2) Petitioner concedes he was told at the second change of plea proceeding that he was "potentially being considered as an armed career offender," but maintains he was not told that he did, in fact, qualify for such an enhancement (Id.) He maintains he told counsel he did not

want to go through with accepting the second plea offer, but counsel coerced and/or otherwise verbally forced him into doing so (Id.:3) According to petitioner, knowledge of his status as an armed career criminal did not come to the government and defense counsel s attention until after he accepted the first plea and was debriefed by the government (Id.) He claims that, had he known the government would utilize his debriefing to enhance his sentence, he would never have negotiated a plea (Id.) Lastly, movant suggests that the prior convictions used to support his enhanced sentence violate the Supreme Court's decisions in Begay and Descamps (Id.:4).. Finally, movant suggests that had he proceeded to trial, he only faced a total guideline sentencing range of 51 to 63 months in prison (Id.:6) Of course, his calculations are mistakenly premised on a sentencing range without the armed career criminal enhancement (Id.)

A. Voluntariness of Plea

As previously narrated, movant pleaded guilty to being a felon in possession of a firearm and ammunition. His claims challenging counsel effectiveness leading up to and resulting in the Rule 11 change of plea proceeding are clearly refuted by the record, and/or otherwise waived due to the entry of a knowing and voluntary plea

The law is clear that a movant waives or more accurately, forfeits his right to contest all nonjurisdictional defects and defenses, when he enters a knowing and voluntary guilty plea See United States v. Broce, 488 U S 563 (1989); McMann v. Richardson, 397 U S 759 (1970) (voluntary guilty plea waives all non-jurisdictional defects); United States v. De La Garza, 516 F 3d 1266, 1271 (11th Cir 2008), quoting, Wilson v. United States, 962

F 2d 996 (11th Cir 1992)(claim of ineffective assistance of counsel relating to pre-plea issues waived by voluntary guilty plea); McCoy v. Wainwright, 804 F 2d 1196, 1198 (11th Cir 1986)(voluntary guilty plea waives all non-jurisdictional defects); see also, United States v. Glinsey, 209 F 3d 386, 392 (5th Cir 2000), citing, United States v. Smallwood, 920 F 2d 1231, 1240 (5th Cir 1991); Smith v. United States, 447 F 2d 487, 488 (5th Cir 1971), citing, Hayes v. Smith, 447 F 2d 488 (5th Cir 1971) "This includes claims of ineffective assistance of counsel except insofar as the ineffectiveness is alleged to have rendered the guilty plea involuntary " United States v. Glinsey, 209 F 3d at 392

In this case, review of the record confirms that the movant's plea was knowing and voluntary, and therefore, the movant has waived any defenses he may have had prior thereto to the charged conduct See United States v. Moriarty, 429 F 3d 1012, 1019 (2005) The transcript of the change of plea proceedings confirms that the court conducted a thorough Rule 11 proceeding In pertinent part, the movant acknowledged under oath that he was satisfied with counsel's representation, that he discussed the charges and the evidence with counsel, as well as, possible defenses prior to the change of plea Movant also acknowledged the rights he was waiving by entering into the plea, and further denied being forced, or otherwise coerced by counsel or anyone into changing his plea

It is also evident that the movant understood the facts and the elements of the offense upon which the charge rested. Moreover, by way of entering into the negotiated plea agreement, the movant was telling his lawyer not to conduct any further investigation and not present at a pre-trial or trial proceeding any legal defenses, that he may be entitled to as it related to his case More

importantly to the issue of his enhanced sentence, movant acknowledged he was facing a 15-year minimum and up to a term of life imprisonment based on the offense of conviction. Under these circumstances, no showing has been made that the plea was anything but knowing and voluntary It further bears mentioning that movant's suggestion that he was forced and/or otherwise coerced by counsel to change his plea is clearly refuted by the record.

Thus, where movant swore under penalty of perjury at the change of plea proceeding that no one had threatened, coerced, or forced him into entering a guilty plea, there is a strong presumption that his representations are true. United States v. Medlock, 12 F 3d 185, 187 (11th Cir 1994); see also United States v. Rogers, 848 F 2d 166, 168 (11th Cir 1988) ("[W]hen a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false ")

As a result, even if counsel the defense and the government were unaware early on, when the first Rule 11 proceeding was conducted, that movant was facing an enhanced sentence as an armed career criminal, certainly by the time the knowing and voluntary second plea proceeding was concluded, movant was aware he was facing such a sentence exposure He further acknowledged exploring the issue with counsel In fact, contrary to the movant's arguments here, counsel did in fact argue against the enhanced sentence. Specifically, defense counsel argued that the prior state court convictions did not qualify as prior crimes of violence for purposes of the armed career criminal enhancement Therefore, they could not be utilized as predicate offenses Under these circumstances, movant has not demonstrated that any that further argument, as suggested movant here, would have resulted in a lesser

sentence In other words, a sentence without the enhancement As a result, he cannot satisfy the prejudice prong under Strickland and is thus entitled to no relief on this claim. See United States v. Ross, 143 Fed.Appx. 936 (11th Cir 2005) ("the district court was within its authority to discredit any allegations that Ross's counsel was ineffective which were contrary to the statements he made under oath at the plea hearing")

Moreover, movant has not overcome the presumption that his statements under oath at the Rule 11 proceeding were true and correct See generally United States v. Clayton, 447 Fed.Appx. 65 (11th Cir 2011) (defendant received close assistance of counsel where, during plea colloquy, defendant "confirmed that he had discussed the charges, plea agreement, and guidelines with his lawyer, had been given adequate time to consult with his lawyer, and was satisfied with his lawyer's representation," and had not "overcome the strong presumption that statements made during the plea colloquy are true"); United States v. Price, 139 Fed.Appx. 253 (11th Cir 2005) (no abuse of discretion in denying motion to withdraw guilty plea where plea hearing transcript "makes clear that the district court went through Price's rights with him, that Price understood those rights, that Price was satisfied with his counsel, and that—despite any factual disputes—Price persisted in pleading guilty" and where hearing transcript included defendant's confirmation "that he had consulted his counsel about how to proceed and that he had been 'extremely' satisfied with his counsel's representation")

To the extent movant means to argue that his plea was not knowing and voluntary because it was premised on counsel's misadvice regarding his sentence exposure, that claim also warrants

no relief Even if this Court were to accept as true movant's allegations that before he entered the second plea, defense counsel somehow led him to believe he would not face an enhanced sentence as an armed career criminal, it cannot be said that such representation was either coercive or that it unduly influenced movant's decision First, an erroneous estimation of the guidelines does not entitle movant to relief in that "[a]n erroneous estimate by counsel as to the length of sentence" is not "necessarily indicative of ineffective assistance " Beckham v. Wainwright, 639 F 2d 262, 265 (5th Cir 1981) [8] Even when an attorney erroneously estimates his client's potential sentence, the movant must satisfy the prejudice requirement of Strickland by showing that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial " Hill, 474 U S at 59, 106 S Ct at 370; United States v. Stumpf, 827 F 2d 1027, 1030 (5th Cir 1987); see also, United States v. Pease, 240 F 3d 938, 940-42 (11th Cir 2001)(rejecting argument by defendant sentenced as a career offender that her plea was not knowing and voluntary because he had relied on counsel's prediction that her potential sentence under the plea agreement would be anywhere from five to ten years); Carranza v. United States, 508 Fed.Appx 873 (11th Cir 2013); United States v. Aryanitis, 902 F 2d 489, 494-95 (7th Cir 1990)(no ineffective assistance where claim based only on inaccurate prediction of sentence)

The movant acknowledged during the second Rule 11 proceeding that, pursuant to the applicable statute, he was facing a 15-year

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[8]The Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit rendered before October 1, 1981, and all Fifth Circuit Unit B decisions rendered after October 1, 1981 Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir 1981)

minimum mandatory as an armed career criminal, and up to a maximum of life in prison He also acknowledged that the court would consider the advisory guideline range, and that movant would be unable to withdraw his plea as a result of the sentence imposed. Movant indicated that he understood the possible sentence he could receive, denied being promised anything, other than as set forth in the newly modified written plea agreement, to induce him to change his plea, and denied being threatened or otherwise forced to plead guilty The law is clear that a defendant's sworn representations, along with the representations of his lawyer and the prosecutor, and any findings by the judge in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings " Blackledge, 431 U S at 73-74 See also United States v. Lemaster, 403 F 3d 216, 221-222 (4th Cir 2005)("[I]n the absence of extraordinary circumstances, the truth of sworn statements made during a Rule 11 colloquy is conclusively established, and a district court should, without holding an evidentiary hearing, dismiss any §2255 motion that necessarily relies on allegations that contradict the sworn statements ")

It bears noting that "[A]s a matter of public policy, no court should tolerate a claim of this kind, wherein the movant literally suggests in his §2255 filings that he lied during the Rule 11 hearing," "[N]or should such a movant find succor in claiming" as movant does here, that "my lawyer told me to lie" or otherwise threatened/coerced him into doing so See Gaddis v. United States, 2009 WL 1269234, *5 (S.D.Ga 2009) (unpublished) In his form §2255, in accordance with 28 U S C §1746(1), movant declared "under penalty of perjury," that the claim(s) were true and correct (Cv-DE#2:14) As noted previously in this Report, movant is now claiming in this proceeding that she was coerced to testify as she

did during her change of plea proceeding before the district court So, he was lying under oath at that time, or is lying under oath now "[S]uch casual lying enables double-waivered, guilty-plea convicts to feel far too comfortable filing otherwise doomed §2255 motions that consume public resources " See Irick v. United States, 2009 WL 2992562 at *2 (S.D. Ga. Sept 17, 2009) However, the Undersigned takes no position on whether the government should "consider investigating the movant for perjury " See Irick v. United States, supra; see also, Rivera v. Allin, 144 F 3d 719, 731 (11th Cir 1998) (district court did not abuse its discretion by dismissing an action without prejudice where plaintiff "had lied under penalty of perjury about the existence of a prior lawsuit"), abrogated on other grounds by Jones v. Bock, 549 U S 199, 127 S.Ct 910, 166 L.Ed.2d 798 (2007)

Here, movant has not shown a reasonable probability that he was coerced, forced, or otherwise unlawfully induced to enter his plea. To the contrary his allegations are directly refuted by the Rule 11 representations made by him under oath. Thus, he cannot now contend that his guilty plea was in reliance upon some alternative characterization of his sentence exposure or advice given to him by his counsel His self-serving statements that he was misadvised by counsel regarding his sentence exposure is wholly conclusory with no support whatever in the record, not to mention incredible [9]

Further, even if we assume, without deciding, that before the

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[9] See generally United States v. Jones, 614 F.2d 80, 81-82 (5th Cir 1980)(district court justified in dismissing section 2255 movant's claims when movant presented only conclusory allegations to support claims) See also Tejada v. Dugger, 941 F 2d 1551, 1559 (11th Cir 1991)(recognizing that a petitioner is not entitled to habeas relief "when his claims are merely 'conclusory allegations unsupported by specifics' or 'contentions that in the face of the record are wholly incredible'" (citation omitted))

plea proceeding it was in some way conveyed to movant that he was to receive a particular lesser sentence as he suggests here, movant's reliance on his attorney's erroneous prediction of a more lenient sentence is not sufficient to render a guilty plea involuntary See Stumpf, 827 at 1030 See also United States v. Harmon, 139 F 3d 899 (5th Cir 1998)(finding that the defendant could not "claim that his guilty plea was involuntary based upon his attorney's erroneous prediction about the length of the sentence") As the Fifth Circuit explained in Daniel v. Cockrell, 283 F 3d 697 (5th Cir 2002):

> A guilty plea is not rendered involuntary by the defendant's mere subjective understanding that he would receive a lesser sentence. In other words, if the defendant's expectation of a lesser sentence did not result from a promise or guarantee by the court, the prosecutor or defense counsel, the guilty plea stands Likewise, a guilty plea is not rendered involuntary because the defendant's misunderstanding was based on defense counsel's inaccurate prediction that a lesser sentence would be imposed.

Daniel, 283 F 3d at 703

It also cannot be overlooked that the entry of the guilty plea was clearly in the best interest of the movant Because of the plea negotiated by defense counsel, movant benefitted from a three level reduction to his base offense level for acceptance of responsibility Had he proceeded to trial and been found guilty, movant's exposure upon conviction may have been significantly greater He also may not have been eligible for a reduction in his guideline range based on acceptance of responsibility On the record before this court, movant has not demonstrated here that but for counsel's errors, he would not have pled guilty but would have gone to trial Hill, 474 U S at 56-59 His suggestion at this

juncture is wholly incredible and therefore rejected

In conclusion, the record reveals that movant is not entitled to relief on any of the arguments presented as it is apparent from the extensive review of the record above that movant's guilty plea was entered freely, voluntarily and knowingly with the advice received from competent counsel and not involuntarily and/or unknowingly entered, as now claimed by him. See Boykin v. Alabama, 395 U S 238, 243 (1969); Brady v. United States, 397 U.S 742, 748 (1970) [10] See also Hill v. Lockhart, supra; Strickland v. Washington, supra 466 U S 668 (1984) Further, as noted above, his enhanced sentence as an career criminal was proper Therefore, no showing has been made that any further argument in this regard during the penalty phase of his case would have resulted in a different outcome, i.e., a lower sentence.

Moreover, it bears noting that movant challenged the lawfulness of his enhanced sentence as an armed career criminal on appeal See United States v. Welch, supra; (Cr-DE#69) The Eleventh Circuit affirmed the district court's finding, ruling in part pertinent that movant's prior robbery conviction qualified as a predicate offense for purposes of the enhancement (Id.)

Consequently, the challenge of his sentence in this collateral proceeding, albeit expanding on the argument that his status as an

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[10]It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea, Boykin v. Alabama, 395 U.S 238, 243 (1969) Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. Brady v. United States, 397 U.S 742, 748 (1970) A voluntary and intelligent plea of guilty made by an accused person who has been advised by competent counsel may not be collaterally attacked. Mabry v. Johnson, 467 U.S 504, 508 (1984)

armed criminal career criminal is unlawful, presented in the guise of an ineffective assistance of counsel, adds nothing of substance to warrant reconsideration of the issue here. See United States v. Nyhuis, 211 F 3d 1340, 1343 (11th Cir. 2000)("Once a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255 ")(internal marks, citation and footnote omitted); Mills v. United States, 36 F 3d 1052, 1056 (11th Cir 1994)(*per curiam*)("[P]rior disposition of a ground of error on direct appeal, in most cases, precludes further review in a subsequent collateral proceeding "); United States v. Rowan, 663 F 2d 1034, 1035 (11th Cir 1981)(*per curiam*)("This Court is not required on § 2255 motions to reconsider claims of error raised and disposed of on direct appeal ") Couching his claim in the guise of an ineffective-assistance-of-counsel claim in this §2255 proceeding adds nothing of substance which would justify a different result See Nyhuis, 211 F 3d at 1343 (defendant was not entitled to collateral relief based on due process claim that was mere re-characterization of double jeopardy and immunity claim that was rejected on direct appeal)(citation omitted)

Stated differently, a claim rejected on direct appeal does not merit rehearing on a different legal theory Nyhuis, 211 F 3d at 1343, citing, Cook v. Lockhart, 878 F 2d 220, 222 (8th Cir 1989) Also, movant has failed to establish prejudice pursuant to Strickland arising from counsel's failure to pursue this argument at sentencing and/or on appeal He is thus entitled to no relief on this claim.

B Challenge to Armed Career Criminal Sentence

Alternatively, it appears movant argues a free standing claim that he is entitled to vacatur of his conviction and sentence based on the Supreme Court's recent decisions in Alleyne v. United States, 133 S Ct 2151 (2013) and Descamps v. United States,[11] ___ U S ____, 133 S Ct 2276 (2013) on the basis that the district court, and not the jury, made factual determinations regarding movant's enhanced sentence. He suggests counsel should have anticipated these arguments (Cv-DE#2; Cv-DE#7)

These decisions are the latest edition to the progeny of the Supreme Court's decision in Apprendi v. New Jersey, 520 U S 466 (2010),[12] in which the Supreme Court held that "[o]ther than the

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[11]In Descamps, the defendant was convicted of possession of a firearm by a convicted felon and sentenced under the Armed Career Criminal Act ("ACCA"), based in part on his prior burglary conviction under California law. Descamps involved application of the "residual clause" of the ACCA, §924(e)(2)(B)(ii), which defines "violent felony" as "burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another " 18 U.S.C §924(e)(2)(B)(ii) The California burglary statute did not include an element of the generic crime of burglary; it did not require that a burglar "enter or remain unlawfully in a building " The Supreme Court held that federal sentencing courts may not apply the "modified categorical approach" (meaning, consulting a limited class of documents, such indictments and jury instructions) to sentencing under ACCA's "residual clause" when the state crime of which the defendant was convicted has a single, indivisible set of elements (meaning, the statute did not contain alternative elements) Descamps, ___ U.S. ____. 133 S.Ct. at 2281-82.

[12]The Eleventh Circuit has held that cases such as, Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) are not retroactively applicable on collateral review See e.g., Varela v. United States, 400 F 3d 864, 867-68 (11th Cir 2005), cert. den'd, 529 U.S. 1122, 120 S.Ct. 1992, 146 L.Ed.2d 817 (2005) The Eleventh Circuit has found that the decision in Alleyne is based on Apprendi, therefore, a defendant whose conviction became final long before Apprendi and Alleyne were decided, cannot now collaterally challenge his conviction based on his jury's failure to find drug quantity, because the holding in Apprendi does not apply retroactively Starks v. Warden, FCC Coleman-USP I, 552 Fed.Appx. 869 (11th Cir 2013)(unpublished) Other courts have similarly held that since Apprendi and its progeny have not been found retroactively applicable, thereby implying that the Supreme Court will not declare Alleyne to be retroactively applicable. See Simpson v. United States, 721 F.3d 875 (7th Cir

fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt " Apprendi, 520 U S at 490 Movant alleges that his guideline range was determined and drove his ultimate sentence upward based on facts which were neither charged in the indictment nor proved beyond a reasonable doubt by the jury at trial Therefore, his sentence enhancement violated Alleyne and Descamps

The Eleventh Circuit has determined that Alleyne, an extension of Apprendi, is not retroactively applicable to cases on collateral review See Jeanty, Jr. v. Warden, FCI-Miami, ___ F 3d ___, 2014 WL 3411144 (11th Cir July 15, 2014)(published)(citing United States v. Harris, 741 F 3d 1245, 1250 n.3 (11th Cir 2014)); see also, Starks v. FCC Coleman USP I, ___ F 3d. ___, 2013 WL 6670797 (11th Cir 2113)(unpublished); see also, Chester v. Warden, ___ Fed.Appx. ___, 2014 WL 104150 (11TH Cir 2014)(unpublished)(citing, Dohrmann v. United States, 442 F 3d 1279, 1281-82 (11th Cir 2006); McCoy v. United States, 266 F 3d 1245, 1256-58 (11th Cir 2001)(holding that Apprendi is not retroactively applicable to cases on collateral review))

Further, other courts who have considered the issue have also held that Alleyne has not been made retroactively applicable to cases on collateral review See In re Payne, No 13-5103, 2013 WL 5200425, at *1-*2 (10th Cir Sept 17, 2013) (agreeing with the Seventh Circuit that Alleyne is an extension of Apprendi and does

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2013); Scott v. United States, 2013 WL 4077546, *1 (S.D.Ga. 2013); Ward v. United States, 2013 WL 4079267, *2 (W.D.N.C. 2013) Unless the Supreme Court decides some time in the future that Alleyne applies retroactively on collateral review, movant cannot now collaterally challenge his convictions and sentences pursuant to Alleyne.

not apply retroactively); Simpson v. United States, 721 F 3d 875, 876 (7th Cir 2013) (holding that Alleyne, like Apprendi, was not made retroactive); Frank v. United States, Nos. CV 113-113, CR 103-045, 2013 WL 4679826, at *3 n. 1 (S D.Ga. Aug 30, 2013) ("The Court is not aware of any authority indicating that Alleyne is retroactively applicable, and the case itself provides no such indication "); Ward v. United States, No 1:02-cr-00063-MR-1, 2013 WL 4079267, at *2 (W.D.N C Aug 13, 2013) (finding that petitioner's motion was untimely and §2255(f)(3) did not apply because the Supreme Court has not found that Alleyne is retroactive to cases on collateral review); Luney v. Quintana, No 6:13-003-DCR, 2013 WL 3779172, at *3 (E D.Ky July 18, 2013) (noting that "there is no indication in Alleyne, that the Supreme Court made [that] holding retroactive to cases on collateral review ")

Like Alleyne, Descamps, an extension of Apprendi is also not retroactively applicable to cases on collateral review The Supreme Court has also not declared Descamps to be retroactive to cases on collateral review Wilson v. Warden, FCC Coleman, 2014 WL 4345685, *3 (11th Cir Sept 3, 2014); Groves v. United States, 755 F 3d 588, 593 (7th Cir 2014); Baker v. Chapa, 2014 WL 4100712, *1 (5th Cir Aug 21, 2014) Nor has the Sixth Circuit so found. Shelton v. United States, 2014 WL 460868, *3 (E.D.Tenn. Feb.5, 2014) Moreover, Descamps was decided in the context of a direct appeal, and the Supreme Court has not since applied it to a case on collateral review Cf In re Anderson, 396 F 3d 1336, 1339 (11th Cir 2005) (holding that United States v. Booker, 543 U S 220 (2005), was not retroactively applicable, in part, because the Supreme Court had decided it on direct appeal, and had not applied it to a case on collateral review)

Nevertheless, it bears noting that even if counsel was deficient for failing to request a downward departure at sentencing for the reasons set forth by the movant in this collateral proceeding, no showing has been made that the court would have granted a further variance, and imposed a lesser sentence Movant has not met his burden of demonstrating that such an argument would have succeeded, much less that his sentence was unreasonable in light of the record before this court.

To the extent movant also argues that the court erred by enhancing his sentence as an ACCA based on facts not charged in the Indictment, found by a jury, nor admitted by him, that claim warrants no relief In fact, the Eleventh Circuit has previously determined that "district courts may determine both the existence of prior convictions and the factual nature of those convictions, including whether they were committed on different occasions, so long as they limit themselves to Shepard-approved documents " United States v. Weeks, 711 F 3d 1255, 1259 (11th Cir 2013) Here, the court properly found movant qualified for an enhanced sentence as an armed career criminal The enhanced penalty provision need not have been charged in the indictment nor proven beyond a reasonable doubt United States v. Weeks, supra. Thus, no deficient performance or prejudice under Strickland has been established arising from counsel's failure to pursue this issue

Moreover, both the Supreme Court and the Eleventh Circuit have held that "[A] sentence must be both procedurally and substantively reasonable See Gall v. United States, 552 U S 38, 51 (2007) ("Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence. "); United States v.

Ellisor, 522 F 3d 1255, 1273 (11th Cir 2008) A sentence will only be reversed as substantively unreasonable upon a "definite and firm conviction that the district court committed a clear error of judgment in weighing the §3553(a) factors " United States v. McGarity, 669 F 3d 1218, 1264 (11th Cir)(internal quotation marks omitted), cert. den'd, McGarity v. United States, ___ U S ___, 133 S.Ct 378, 184 L.Ed.2d 220 (2012). The party challenging the sentence bears the burden of proof Id.

The record confirms that the court not only considered defense counsel's arguments against the enhanced sentence, but also considered the advisory guidelines, along with the §3553 statutory factors The movant was sentenced to the statutory minimum mandatory term of 15 years in prison. It is evident from the record that the district court properly applied 18 U S C §3553 to the facts of this case and imposed a substantively reasonable sentence. Moreover, the fact that movant's sentence is far below the maximum term of life imprisonment, is also a strong indication of substantive reasonableness See United States v. Gonzalez, 550 F 3d 1319, 1324 (11th Cir 2008)(holding that a sentence was substantively reasonable, in part because it was "well below the maximum ten-year sentence") Movant has not demonstrated that counsel was deficient, much less that he was prejudiced under Strickland based on counsel's failure to pursue this nonmeritorious issue Strickland v. Washington, supra

In conclusion, the record reveals that movant is not entitled to relief on any of the claims presented in this motion to vacate proceeding as it is apparent from the extensive review of the record that the claims warrant no relief, and more particularly, that movant's guilty plea was entered freely, voluntarily and

knowingly with the advice received from competent counsel and not involuntarily and/or unknowingly entered, as now claimed by him. See Boykin v. Alabama, 395 U.S 238, 243 (1969); Brady v. United States, 397 U S 742, 748 (1970) [13] See also Hill v. Lockhart, supra; Strickland v. Washington, supra. 466 U S. 668 (1984)

VI Evidentiary Hearing

To the extent movant requests an evidentiary hearing on his claim, it should be denied. The movant has the burden of establishing the need for an evidentiary hearing, and he would only be entitled to a hearing if his allegations, if proved, would establish his right to collateral relief See Higgs v. United States, 711 F Supp.2d 479, 552 (D.Md. 2010)(citing Townsend v. Sain, 372 U S 293, 312, 83 S.Ct 745, 9 L Ed.2d 770 (1963), overruled on other grounds by 504 U S 1, 112 S Ct 1715, 118 L Ed.2d 318 (1992)) Further, a hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations or affirmatively contradicted by the record. See Holmes v. United States, 876 F 2d 1545, 1553 (11th Cir 1989), citing, Guerra v. United States, 588 F 2d 519, 520-21 (5th Cir 1979) As discussed in this Report, the arguments raised are unsupported by the record or without merit No evidentiary hearing is required.

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[13]It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea. Boykin v. Alabama, 395 U S. 238, 243 (1969) Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. Brady v. United States, 397 U.S. 742, 748 (1970) A voluntary and intelligent plea of guilty made by an accused person who has been advised by competent counsel may not be collaterally attacked. Mabry v. Johnson, 467 U.S. 504, 508 (1984)

VII Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U S C §2253(c)(2) " See Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U S C §2253(c) " See Fed.R.App.P 22(b)(1) Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability See 28 U S C §2255 Rule 11(b)

However, "[A] certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C §2253(c)(2) To make a substantial showing of the denial of a constitutional right, a §2255 movant must demonstrate "that reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further " Miller-El v. Cockrell, 537 U S 322, 336-37 (2003) (citations and quotation marks omitted); see also Slack v. McDaniel, 529 U S 473, 484 (2000); Eagle v. Linahan, 279 F 3d 926, 935 (11th Cir 2001)

After review of the record in this case, the Court finds the movant has not demonstrated that he has been denied a

constitutional right or that the issue is reasonably debatable See Slack, 529 U S at 485; Edwards v. United States, 114 F 3d 1083, 1084 (11th Cir 1997) Consequently, issuance of a certificate of appealability is not warranted and should be denied in this case Notwithstanding, if movant does not agree, he may bring this argument to the attention of the district judge in objections

VIII Conclusion

It is therefore recommended that this motion to vacate be denied on the merits, that any pending motions not otherwise ruled upon be denied as moot, that a certificate of appealability be denied; and, the case closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Signed this 29th day of September, 2014

UNITED STATES MAGISTRATE JUDGE

cc: Gregory Welch, Pro Se
Reg No. 73675-004
F C.I - Coleman (Med.)
P.O. Box 1032
Coleman, FL 33521

Jennifer A. Keene, AUSA
U S Attorney's Office
500 East Broward Boulevard, 7th Floor
Fort Lauderdale, FL 33394

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT P. TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Douglas J. Mincher
Clerk of Court

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June 09, 2015

Steven M. Larimore
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 14-15733-C
Case Style: Gregory Welch v. USA
District Court Docket No: 0:13-cv-62770-KAM
Secondary Case Number: 0:09-cr-60212-KAM-1

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DOUGLAS J. MINCHER, Clerk of Court

Reply to: Walter Pollard, C
Phone #: (404) 335-6186

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-15733-C

GREGORY WELCH,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Gregory Welch moves for a certificate of appealability in order to appeal the denial of his motion to vacate, filed pursuant to 28 U.S.C. § 2255. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Welch's motion for appointment of counsel is DENIED AS MOOT.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

APPENDIX "C"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-CR-60212-KAM

UNITED STATES OF AMERICA

vs.

GREGORY WELCH,

Defendant.
_____/

PLEA AGREEMENT

The United States of America and Gregory Welch (hereinafter referred to as the "Defendant") enter into the following agreement:

1. The Charges to which the Defendant Is Pleading Guilty: The Defendant agrees to plead guilty to the sole Count of the Indictment. That Count charges that, on or about March 19, 2009, in Broward County, in the Southern District of Florida, the Defendant, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, that is: (a) one (1) Lorcin, Model L380, .380-caliber semi-automatic pistol, serial number 532504; (b) five (5) rounds of Winchester .380-caliber ammunition; and (c) one (1) round of Remington .380-caliber ammunition; any one of which being a violation; in violation of Title 18, United States Code, Section 922(g)(1).

2. The Elements of the Offenses of Conviction: The elements of the offense of possession of a firearm and ammunition by a convicted felon, in violation of Title 18, United

States Code, Section 922(g)(1), as charged in the sole Count of the Indictment, are as follows:

First, that the Defendant knowingly possessed a firearm in or affecting interstate commerce, as charged; and

Second. that before the Defendant possessed the firearm, the Defendant had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense.

3. Statutory Penalties: The Defendant also understands and acknowledges that, as to the sole Count of the Indictment, the Court may impose a maximum sentence of ten (10) years' imprisonment, to be followed by up to three (3) years' supervised release, and may impose a fine of $250,000. The Defendant understands and acknowledges that a violation of the terms of his supervised release can result in additional criminal penalties.

4. Special Assessment: The Defendant further understands and acknowledges that, in addition to the sentence imposed under paragraph 3 of this Agreement, a special assessment in the amount of $100 will be imposed. The Defendant agrees that any special assessment imposed shall be paid at the time of sentencing.

5. Applicability of Sentencing Guidelines: The Defendant is aware that the sentence will be imposed by the Court after considering the Federal Sentencing Guidelines and Policy Statements (hereinafter "Sentencing Guidelines"). The Defendant acknowledges and understands that the Court will compute an advisory sentence under the Sentencing Guidelines and that the applicable guidelines will be determined by the Court relying in part

on the results of a Pre-Sentence Investigation by the Court's Probation Office, which investigation will commence after the entry of the Defendant's guilty plea. The Defendant is also aware that, under certain circumstances, the Court may depart from the advisory sentencing guideline range that it has computed, and may raise or lower that advisory sentence under the Sentencing Guidelines. The Defendant further understands that the Court is required to consider the advisory guideline range determined under the sentencing guidelines, but is not bound to impose that sentence; the Court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory sentence. Knowing these facts, the Defendant understands and acknowledges that the Court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offense identified in paragraph 1 and that the Defendant cannot withdraw his guilty plea solely as a result of the sentence imposed.

6. Rights Waived by Pleading Guilty: The Defendant understands that by pleading guilty, he knowingly and voluntarily waives the following rights:

a. the right to plead not guilty and to persist in a plea of not guilty;

b. the right to a speedy and public trial before a jury of his peers;

c. the right to the effective assistance of counsel at trial, including, if the Defendant could not afford an attorney, the right to have the Court appoint an attorney for the Defendant;

d. the right at trial to be presumed innocent until guilt has been proven

beyond a reasonable doubt by the United States;

e. the right at trial to confront and cross-examine witnesses against the Defendant;

f. the right to compel or subpoena the testimony of witnesses and other evidence to present at trial;

g. the right at trial to testify or to remain silent, and the right that such silence could not be used against the Defendant;

h. the right to challenge the sufficiency of the indictment; and

I. the right to appeal any pretrial rulings or a finding of guilt.

7 Government's Right to Disclose Information to the Court: The Office of the United States Attorney for the Southern District of Florida (hereinafter "Office") reserves the right to inform the Court and the Probation Office of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the Defendant and the Defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this Agreement, this Office further reserves the right to make any recommendation as to the quality and quantity of punishment.

8. Acceptance of Responsibility: The United States and the Defendant agree that, although not binding on the Probation Office or the Court, they will jointly recommend that the Court should reduce by two levels the sentencing guideline level applicable to the Defendant's offense, pursuant to Section 3E1.1 of the Sentencing Guidelines, based upon the

Defendant's recognition and affirmative and timely acceptance of personal responsibility. If at the time of sentencing the Defendant's offense level is determined to be 16 or greater, and the Defendant complies with the requirements of Section 3E1.1, the United States will make a motion requesting an additional one-level decrease pursuant to Section 3E1.1(b) of the Sentencing Guidelines, stating that the Defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the Court to allocate their resources efficiently.

9. Limitation on Joint Sentencing Recommendations: The Defendant understands and agrees that the United States will not be required to make the motion and sentencing recommendation set forth in paragraph 8 if the Defendant: (a) fails or refuses to make a full, accurate and complete disclosure to the Probation Office of the circumstances surrounding the relevant offense conduct; (b) is found to have misrepresented facts to the government prior to entering this plea agreement; or (c) commits any misconduct after entering into this plea agreement, including but not limited to committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official.

10. Factual Proffer: The Defendant, his counsel, and the United States further agree that, had this case proceeded to trial, the United States would have introduced the following evidence, which is sufficient to support a guilty plea and proves beyond a reasonable doubt that the Defendant is guilty of the crime charged in the sole Count of the

Indictment:

On March 17, 2009, law enforcement officers searched Defendant's apartment. A Lorcin, Model L380, .380-caliber semi-automatic pistol, serial number 532504, was found in the attic space in the apartment. The firearm was loaded with six (6) rounds of ammunition, five (5) of which were Winchester .380-caliber ammunition, and one (1) of which was Remington .380-caliber ammunition. After the items were found, Defendant gave a recorded statement admitting to possession of the firearm and ammunition. The firearm and all six (6) rounds of ammunition have traveled in interstate or foreign commerce. The Defendant is a previously convicted felon.

11. No Promises or Representations Regarding Ultimate Sentence: The Defendant is aware that the sentence has not yet been determined by the Court. The Defendant also is aware that any estimate of the probable sentencing range or sentence that the Defendant may receive, whether that estimate comes from the Defendant's attorney, the government, or the probation office, is a prediction, not a promise, and is not binding on the government, the probation office, or the Court. The Defendant understands further that any recommendation that the government makes to the Court as to sentencing, whether pursuant to this agreement or otherwise, is not binding on the Court and the Court may disregard the recommendation in its entirety. The Defendant acknowledges that no one has promised or guaranteed what sentence the Court will impose. The Defendant understands and acknowledges, as previously acknowledged in paragraph 5 above, that the Defendant may not withdraw his plea based upon (a) the Court's decision not to accept a sentencing recommendation made

by the Defendant and/or the government, or (b) the fact that he received an incorrect estimate of the sentence that he would receive, whether that estimate came from his attorney, the United States, and/or the Probation Office.

12. Voluntariness of Plea: The Defendant agrees that he has entered into this Plea Agreement freely and voluntarily, and that no threats or promises, other than the promises contained in this written Plea Agreement, were made to induce the Defendant to enter his plea of guilty.

13. Forfeiture and Consent to Disposal/Destruction of Firearm and Ammunition: The Defendant agrees to forfeit all interests in any firearm or ammunition that is the subject of the Indictment, which the Defendant currently owns or has previously owned, or over which the Defendant currently, or has in the past, exercised control, directly or indirectly. This includes, but is not limited to,

(a) one (1) Lorcin, Model L380, .380-caliber semi-automatic pistol, serial number 532504;

(b) five (5) rounds of Winchester .380-caliber ammunition; and

(c) one (1) round of Remington .380-caliber ammunition.

Defendant further agrees to hold the United States, its agents, and employees harmless from any claims whatsoever in connection with the seizure or destruction of property covered by this agreement. The Defendant agrees that this property may be destroyed or disposed of in accordance with the policies and procedures of the custodial agency. The Defendant further agrees to waive all constitutional and statutory challenges in any manner (including direct

appeal, habeas corpus, or any other means) to any destruction or disposal of property carried out in accordance with this Plea Agreement on any grounds, including that the forfeiture constitutes an excessive fine or punishment. Defendant acknowledges that all property covered by this agreement is subject to forfeiture as property involved in illegal conduct related to the sole Count of the Indictment.

14. Appellate Waiver: The Defendant is aware that Title 18, United States Code, Section 3742 affords the Defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this plea agreement, the Defendant hereby waives all rights conferred by Section 3742 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or a variance from the guideline range that the court establishes at sentencing. The Defendant further understands that nothing in this agreement shall affect the government's right and/or duty to appeal as set forth in Title 18, United States Code, Section 3742(b). However, if the United States appeals the Defendant's sentence pursuant to Section 3742(b), the Defendant shall be released from the above waiver of appellate rights. By signing this agreement, the Defendant acknowledges that he has discussed the appeal waiver set forth in this agreement with his attorney. The Defendant further agrees, together with the United States, to request that the district court enter a specific finding that the Defendant's waiver of his right to appeal the sentence to be imposed in this case was knowing and voluntary.

15. Appellate Waiver Carve-Out. Notwithstanding the above waiver of appeal, pursuant to Federal Rule of Criminal Procedure 11(a)(2), the United States consents to the Defendant's entry of a conditional plea of guilty and a reservation of the right to have an appellate court review the district court's denial of his motion to suppress the physical evidence, specifically, the Lorcin, Model L380, .380-caliber semi-automatic pistol, serial number 532504; the five (5) rounds of Winchester .380-caliber ammunition; and the one (1) round of Remington .380-caliber ammunition. The United States and the Defendant agree that the suppression issue pertaining to the physical evidence is case dispositive.

16. Entire Agreement: This is the entire agreement and understanding between the United States and the Defendant. There are no other agreements, promises, representations, or understandings. This Agreement binds only the United States Attorney's Office for the Southern District of Florida. It does not bind any other United States Attorney's Office, or any other office or agency of the United States, or any state or local prosecutor.

WIFREDO A. FERRER
UNITED STATES ATTORNEY

Date: 6/18/10 By: _____
JASON LINDER
ASSISTANT UNITED STATES ATTORNEY

Date: 6/18/10 By: _____
GREGORY WELCH, DEFENDANT

Date: 6/18/10 By: _____
PETER BIRCH
ATTORNEY FOR DEFENDANT

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 13, 2012
JOHN LEY
CLERK

No. 10-14649

D.C. Docket No. 0:09-cr-60212-KAM-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

GREGORY WELCH,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 13, 2012)

Before DUBINA, Chief Judge, FAY, and KLEINFELD,* Circuit Judges.

* The Honorable Andrew J. Kleinfeld, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

KLEINFELD, Senior Circuit Judge:

We address whether consent to a search was voluntary and whether it was "fruit of the poisonous tree." We also address whether a Florida conviction for robbery is a "violent felony" under the Armed Career Criminal Act.

Facts

Broward County sheriff's deputies had probable cause to believe that a John Jacobs had robbed a convenience store. Two people had been shot during the robbery. The deputy sheriffs learned that Jacobs lived with his mother in an apartment complex behind the store, and "frequented" two other apartments there, Gregory Welch's being one of them. Two days after the robbery, thirteen officers went to the three apartments looking for Jacobs. They had not obtained search or arrest warrants. The plan was to have groups of three officers knock simultaneously on the doors and ask whomever was there whether they had seen Jacobs. The police knew what Jacobs looked like, because one of the robbery victims had identified him from a photograph.

Someone other than Jacobs answered the door at Welch's apartment. The

three officers at the door asked him if anyone else was there, and he said there was, but would not say who. The police entered and did a "limited protected sweep" to see if anyone inside posed a threat to them. Welch was in a bedroom on the bed talking on a cell phone, smoking a "joint," and minding a baby. The police had drawn their guns before entering the apartment, but holstered them when they saw Welch on the bed.

The police took Welch out onto the balcony. They heard on the police radio that Jacobs had been arrested, so now they were looking only for his gun. They asked Welch if they could search his apartment. He refused. When the police told him they would then have to get a search warrant, which "would take a while," he consented orally and signed a written consent form. It was "four or five minutes, if that" from when the police entered the apartment to when they asked for consent, and another "several" minutes between oral and written consent. The police then searched the apartment, and found Welch's pistol (which was not the gun Jacobs had used in the robbery) and ammunition in "an attic space." After the police found the pistol and cartridges, they put Welch in their van, in the passenger seat and without handcuffs, and he admitted that the pistol and ammunition were his.

Though Welch testified otherwise, the district court found that: (1) the police did not search the apartment until Welch gave his written consent; (2) the police did not threaten to ransack the apartment if he refused consent; (3) the police did not threaten to have the Department of Children and Families take Welch's children away if he refused consent; and (4) the consent form was read and explained to Welch. The district court found that Welch was not intimidated into consenting by the police, as was shown by his initial refusal as well as the plain advice of rights in the form. Rather, the court found, Welch consented because he was not going to be allowed back into the apartment to somehow dispose of the handgun and ammunition, so it made sense for him to agree to the search and hope the police would not find his hiding place.

The district court denied Welch's motion to suppress the pistol and his statements in the police car. The court held that the initial "protective sweep" was unlawful, because the police were not lawfully in the apartment. They entered to do the sweep, instead of doing the sweep because they had lawfully entered and needed to protect themselves after doing so. The question, as the court saw it, was whether the consent to search was voluntary, and whether the discovery of the pistol and Welch's admission were "tainted" by the unlawful entry that led to

them. The court held that the consent was voluntary, and that the consent and admission were not tainted.

Welch pleaded guilty to being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1), reserving the right to appeal the denial of his motion to suppress. The presentence report categorized Welch as an armed career criminal because of three prior violent felony convictions, and concluded that the Armed Career Criminal Act required that he be sentenced to a minimum of fifteen years in prison because of these prior convictions.[1] That sentence was imposed, subject to Welch's reservation of the right to challenge it. Only one of the predicate offenses is challenged in this appeal, a 1996 conviction for Florida strong arm robbery.

Analysis

A. The Motion to Suppress

Welch argues that the pistol and ammunition should be suppressed because they were found in an unlawful search, and that his subsequent statements made while he was sitting in the passenger seat of the police car should be suppressed

[1] 18 U.S.C. § 924(e).

because the putatively unlawful sweep brought them about. The government argues that the initial entry into the apartment was not unlawful, though the district court concluded that it was. We need not decide this question. Even if the sweep was unlawful, the government could avoid suppression if it showed that Welch's consent to the search was voluntary, and that it was not tainted by the unlawful sweep.[2] We, like the district court, so conclude.

Denial of a motion to suppress is a mixed question of law and fact.[3] The district court's findings of fact control unless they are clearly erroneous, but its interpretation and application of law are reviewed de novo.[4]

The first question we address is whether Welch's consent and admissions were "fruit of the poisonous tree," the "poisonous tree" being the putatively unlawful sweep. It is undisputed that the officers who entered Welch's room did so with their guns drawn, but holstered them when they saw that Welch was unarmed. And it is undisputed that Welch consented to the search, first orally and

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[2] United States v. Delancy, 502 F.3d 1297, 1308 (11th Cir. 2007).

[3] Id. at 1304.

[4] Id.

then in writing, within a few minutes of being escorted onto his balcony. Most importantly, it is undisputed that Welch initially refused to consent.

Two precedents control our analysis, United States v. Santa[5] and United States v. Delancy.[6] In both cases, we considered three factors that gave us a "useful structure" to determine whether a defendant's consent was tainted by illegal police actions: the time elapsed between the illegal act and the search, any intervening circumstances, and the purpose and flagrancy of the unlawful government conduct.[7] In Santa, the consent, even if voluntary, "did not purge the primary taint of the illegal entry and arrest."[8] The suspect was still on the floor, handcuffed, three minutes after the DEA had broken down his door and burst into his apartment, when he told them where they could find the drugs. The search and discovery of the evidence were all over by the time he signed the consent form.[9] Santa is of no help to Welch, because Welch was standing on the balcony, not handcuffed, when he consented, and he initially refused to consent. No search

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[5] United States v. Santa, 236 F.3d 662 (11th Cir. 2000).

[6] United States v. Delancy, 502 F.3d 1297 (11th Cir. 2007).

[7] Id. at 1309–10.

[8] Santa, 236 F.3d at 677.

[9] Id. at 677–78.

occurred until he changed his mind. It is one thing to consent to a police request while flat on one's face on the floor and handcuffed, quite another when chatting without any physically forcible coercion after having left the scene of the police intrusion.

This distinction bears on the difference between Santa and Delancy. Delancy assumes, as we do, that the protective sweep was unlawful, but, as in this case, the district court found that the sweep was for the protection of the officers, not a subterfuge to intimidate and question the appellant.[10] Had the entry "been made for the purpose of gaining consent," then the consent would be tainted, because attenuation analysis is unnecessary "when the police act with the express purpose of exploiting an illegal action."[11] That is the central principle of a search that is unconstitutional as "fruit of the poisonous tree" despite voluntary consent.[12] And once inside, albeit unlawfully, the officers neither in Delancy nor here acted "flagrantly" by "tear[ing] the house apart."[13] There and here, "timing is not the

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[10] Delancy, 502 F.3d at 1312.

[11] Id.

[12] See Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441 (1963).

[13] Delancy, 502 F.3d at 1313.

most important factor."[14] We decide whether consent was tainted by illegality with "a pragmatic evaluation of the extent to which the illegal police conduct caused the defendant's response," not with a stopwatch.[15]

"When [police] enter unlawfully but mistakenly and in good faith, and when they obtain the knowing, intelligent, and voluntary consent of a third party without exploiting their unlawful entry in any way, the purposes of the exclusionary rule would not be served by excluding valuable evidence."[16] In this case, as in Delancy, there was no such exploitation and is no "taint" such as to make the evidence "fruit of the poisonous tree," if the consent was voluntary.[17] And it was.

We review voluntariness as a factual question that is determined under the totality of the circumstances.[18] Relevant factors include "voluntariness of the defendant's custodial status, the presence of coercive police procedure, the extent

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[14] Id. at 1311.

[15] Id. at 1310 (internal quotation marks and citations omitted).

[16] Id. at 1314.

[17] Cf. Oregon v. Elstad, 470 U.S. 298, 306, 105 S. Ct. 1285, 1291, 84 L. Ed. 2d 222 (1985).

[18] United States v. Blake, 888 F.2d 795, 798 (11th Cir. 1989).

and level of the defendant's cooperation with police, the defendant's awareness of his right to refuse to consent to the search, the defendant's education and intelligence, and, significantly, the defendant's belief that no incriminating evidence will be found."[19]

Welch argues he was coerced into giving consent. The officers asked for consent a few minutes after entering his bedroom with their guns drawn. But Welch must not have felt coerced into consenting when they first asked, because he declined to consent. They took him out on the balcony, asked if they could search, and he told them they could not. A person who actually says "no" has not been coerced into saying "yes."

Thus at least up to the time Welch refused to consent, he cannot be said to have been coerced into consenting involuntarily. That leaves, for analysis of coercion and voluntariness, what happened after he said "no." The police officer standing on the balcony with him said, "Fine, but we're going to have to get a search warrant." That is not coercion vitiating voluntariness. And it did not. Welch still did not consent. What changed his mind was the officer's next remark,

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[19] Id.

that "it would take a while."

The explicit threat here is that Welch might have to stand around with nothing to do for some substantial period of time, much as we all do whenever we are stuck in a line. It would be a delicate will indeed that might be overborne by the threat of a period of idleness and wasted time. Yet that threat, "it would take a while," is what changed Welch's "no" to a "yes."[20]

The district judge provided a persuasive explanation of why Welch changed his mind. Welch, the court found, "reasonably believed that the officers would eventually be able to obtain a search warrant" and that, because he would have to wait on the balcony while they did, he would not be able to go into the apartment, retrieve the pistol and ammunition, and somehow dispose of them before the police came back with a warrant. So "it made sense for [Welch] to agree to the search rather than wait for the warrant to be obtained and, because of where the

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[20] Although Welch testified that the officers threatened to send his children to Child Services if he did not consent, the judge found that he was not telling the truth, and that this did not occur. That threat could not overbear his will, if, as the court reasonably found, it was not made. We do not mean to imply that a warning that social workers will come to care for children if their adult caregivers become unavailable on account of detention is necessarily an improperly coercive threat, as opposed to helpful information assuring that children will not be abandoned to the street.

items were hidden, hope for the best." That was a rational gamble, but one that Welch lost. Welch's consent was not coerced, just constrained, by having to place his bet on one of two poor alternatives. Maybe if he let them in, the police would want to get the search done quickly and fail to find his contraband. Or maybe if he put them to the trouble of getting a search warrant, they would search more thoroughly because he had inconvenienced them.

The district court's findings were supported by the evidence and its conclusion that Welch gave legally efficacious consent to the search was correct.

B. Whether Florida Robbery Is a "Violent Felony"

The ordinary maximum sentence for being "a felon in possession of a firearm" is ten years imprisonment.[21] But if a felon in possession has three previous convictions for violent felonies or serious drug offenses, then the Armed Career Criminal Act requires a minimum sentence of fifteen years imprisonment.[22] Welch had three previous potentially qualifying convictions when he was sentenced to this statutory minimum. He argues on appeal that his 1996 Florida

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[21] 18 U.S.C. §§ 922(g)(1), 924(a)(2).

[22] 18 U.S.C. § 924(e).

conviction for strong arm robbery does not qualify as a "violent felony." If that conviction were not counted as a predicate offense, he would not be subject to the statutory minimum.

The parties argue the case primarily under the categorical approach, not the modified categorical approach.[23] The record cognizable for purposes of the statutory enhancement is sparse. The presentence report says that according to the victim, Welch punched him in the mouth, fought with him, and grabbed his gold bracelet from his wrist, while another robber took the gold chain from the victim's neck. But the presentence report does not state the source of this information, and the record merely includes an information alleging that Welch unlawfully took jewelry from the victim's person "by the use of force, violence, assault, or putting in fear," and a judgment showing that Welch pleaded guilty to this information, and was convicted of "strong arm robbery" in violation of Florida Statute Section 812.13(1). We decide this issue under the categorical approach.

The federal Armed Career Criminal Act defines "violent felony" as felonies

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[23] "Under [the categorical] approach, we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction." James v. United States, 550 U.S. 192, 202, 127 S. Ct. 1586, 1594, 167 L. Ed. 2d 532 (2007) (internal quotation marks and citations omitted).

that have as an element the "use, attempted use, or threatened use of physical force," or that are "burglary, arson, or extortion, involve[] use of explosives, or otherwise involve[] conduct that presents a serious potential risk of physical injury to another."[24] Welch's Florida robbery conviction was pursuant to a statute that criminalized stealing property from another's person or custody using "force, violence, assault, or putting in fear."[25]

Welch's argument is that the degree of "force" required to violate the state statute at the time of his conviction was too slight to satisfy the federal statute. His point is that Florida law at the time made mere snatching a robbery, and that mere snatching is not forceful enough to satisfy the federal statute under either the "elements clause" or the "residual clause" ("serious potential risk of physical injury to another") of the federal statute. We review de novo whether a prior

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[24] "[T]he term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]" 18 U.S.C. § 924(e)(2)(B).

[25] "'Robbery' means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1).

crime qualifies as a violent felony under the statute.[26] In "determining whether a defendant was convicted of a 'violent felony,' we [turn] to the version of state law that the defendant was actually convicted of violating."[27]

In 1996, when Welch pleaded guilty to robbery, Florida law clearly established that a taking by stealth, as in pickpocketing where the victim is not aware of the theft, was merely larceny, not robbery.[28] But the state courts of appeal were divided on whether a snatching, as of a purse, or cash from a person's hand, or jewelry on the person's body, amounted to robbery.[29] Subsequently, a new Florida statute established the crime of "robbery by sudden snatching," in

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[26] United States v. McGill, 618 F.3d 1273, 1274–75 (11th Cir. 2010).

[27] McNeill v. United States, ___ U.S. ___, 131 S.Ct. 2218, 2222, 180 L. Ed. 2d 35 (2011).

[28] See McCloud v. State, 335 So. 2d 257, 258–59 (Fla. 1976).

[29] See, e.g., Goldsmith v. State, 573 So. 2d 445, 445 (Fla. 2d Dist. Ct. App. 1991) (holding that the "slight force used to remove the bill from [the victim's] hand" was "insufficient to constitute the crime of robbery"); A.J. v. State, 561 So. 2d 1198, 1198 (Fla. 3d Dist. Ct. App. 1990) (holding that "the degree of force used to [grab a camera hanging from the victim's shoulder] was insufficient to constitute robbery"); Larkins v. State, 476 So. 2d 1383, 1385 (Fla. 1st Dist. Ct. App. 1985) (holding that "sufficient force was exercised to fulfill the requirements of the robbery statute" where the robber grabbed cash out of the victim's hand); Andre v. State, 431 So. 2d 1042, 1043 (Fla. 5th Dist. Ct. App. 1983) (holding that "the act of 'snatching' money from another's hands is force and that force will support a robbery conviction").

between larceny and robbery.[30] This statute appears to have been a legislative response to a 1997 Florida Supreme Court decision holding that "there must be resistance by the victim that is overcome by the physical force of the offender" to establish robbery, so that the intermediate appellate decisions holding mere snatching to be sufficient were put in doubt.[31] Welch pleaded guilty before the Florida Supreme Court decision and the new statute, in a judicial district that had not yet spoken definitively on the question,[32] and at a time when the controlling Florida Supreme Court authority held that "any degree of force" would convert larceny into a robbery.[33] So we assume for purposes of analysis that Welch pleaded guilty to robbery at a time when mere snatching sufficed.[34]

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[30] "'Robbery by sudden snatching' means the taking of money or other property from the victim's person, with intent to permanently or temporarily deprive the victim or the owner of the money or other property, when, in the course of the taking, the victim was or became aware of the taking. In order to satisfy this definition, it is not necessary to show that: (a) The offender used any amount of force beyond that effort necessary to obtain possession of the money or other property; or (b) There was any resistance offered by the victim to the offender or that there was injury to the victim's person." Fla. Stat. § 812.131 (2000).

[31] Robinson v. State, 692 So. 2d 883, 886 (Fla. 1997) (holding that robberies must "be accomplished with more than the force necessary to remove the property from the person").

[32] See Santiago v. State, 497 So. 2d 975, 976 (Fla. 4th Dist. Ct. App. 1986) (holding that where a defendant reached into a car and tore necklaces off of a victim's neck, leaving scratch marks, evidence of force was sufficient to support a robbery because the "facts of this case, unlike picking a pocket or snatching a purse without any force or violence, show sufficient force, be it ever so little, to support robbery") (emphasis added).

[33] McCloud v. State, 335 So. 2d 257, 258–59 (Fla. 1976).

[34] "A federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court

United States v. Lockley holds that Florida attempted robbery is a "crime of violence" under the Sentencing Guidelines.[35] Welch argues that we should distinguish Lockley for two reasons. First, Welch points out that Lockley held that Florida attempted robbery is a "crime of violence" under the Sentencing Guidelines,[36] while the issue here is whether Florida robbery is a "violent felony" under the Armed Career Criminal Act.[37] Second, Welch argues that we should distinguish Lockley because Lockley was convicted after Florida promulgated the "sudden snatching" statute, so snatching from the person might furnish the basis for a robbery conviction here but not in Lockley.

We conclude that even though these distinctions may fairly be made, they should make no difference. We have recognized that the definitions of "crime of

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would decide the issue otherwise." Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 690 (11th Cir. 1983).

[35] United States v. Lockley, 632 F.3d 1238, 1246 (11th Cir. 2011).

[36] "The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a) (2002).

[37] "[T]he term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]" 18 U.S.C. § 924(e)(2)(B).

violence" under the Sentencing Guidelines and "violent felony" under the Armed Career Criminal Act are "virtually identical," and have held that "[c]onsidering whether a crime is a 'violent felony' is similar to considering whether a conviction qualifies as a 'crime of violence[.]'"[38] We see no reason not to apply Lockley to a case addressing whether Florida robbery is a "violent felony" under the Armed Career Criminal Act.

We also see no reason not to apply Lockley to 1996 Florida robbery, even if robbery at that time could be accomplished by mere snatching. Welch's strongest argument comes from a footnote in Lockley distinguishing the new "robbery by sudden snatching" statute. It notes that while sudden snatching involves "pick-pocketing or other similar activity (so long as the victim is in possession of the money or property and realizes he is being victimized)," robbery under the Florida robbery statute "concerns a far more aggressive and potentially violent form of robbery."[39] Though Lockley does not reach the question of whether robbery by sudden snatching would or would not present "a serious risk of physical injury to another" under the residual clause, we conclude that it does.

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[38] U.S. v. Alexander, 609 F.3d 1250, 1253 (11th Cir. 2010) (internal quotation marks and citations omitted).

[39] Lockley, 632 F.3d at 1246 n.7

Welch correctly points out that under Johnson v. United States, "physical force" means not merely what "force" means in physics, but "violent force—that is, force capable of causing physical pain or injury to another person."[40] That Johnson discussion was in the context of the elements clause requirement of "physical force," not the residual clause requirement of "serious risk of potential injury to another." Arguably the elements clause would not apply to mere snatching, but the issue is not cut and dried. We need not decide whether snatching is sufficiently violent under the elements clause, though, because it suffices under the residual clause.

We look at the statute of conviction to see whether, under the residual clause, "the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another."[41] Under United States v. Harrison, we apply a three-step analysis to see: (1) how the crime is ordinarily committed; (2) whether the crime poses a "serious potential risk of physical injury," similar in degree to the listed crimes; and (3) whether the crime is similar in kind to the listed crimes, or, using the language from Begay v. United States,

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[40] Johnson v. United States, ___ U.S. ___, 130 S. Ct. 1265, 1271, 176 L. Ed. 2d 1 (2010).

[41] James, 550 U.S. at 202, 208.

whether the crime is "purposeful, violent, and aggressive."[42] Sykes v. United States partially abrogated Harrison,[43] and we recently revisited Harrison in United States v. Chitwood.[44] Chitwood limits Begay's "purposeful, violent, and aggressive" language to "strict liability, negligence, and recklessness crimes."[45] Offenses that are not "strict liability, negligence, and recklessness crimes," like robbery, fall within the residual clause "if they categorically pose a serious risk of physical injury that is similar to the risk posed by one of the enumerated crimes."[46]

Sudden snatching ordinarily involves substantial risk of physical injury to the victim. The victim's natural reaction is likely to be to try to hold on to his or her money or property, leading in many cases to serious injury. For example, in the Florida Supreme Court case with the "any degree of force" language, the old woman died from the fall she took when the robber grabbed her purse in a parking

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[42] United States v. Harrison, 558 F.3d 1280, 1287 (11th Cir. 2009); Begay v. United States, 553 U.S. 137, 145, 128 S.Ct. 1581, 1586, 170 L. Ed. 2d 490 (2008).

[43] Sykes v. United States, ___ U.S. ___, 131 S. Ct. 2267, 2277, 180 L. Ed. 2d 60 (2011).

[44] United States v. Chitwood, 676 F.3d 971 (11th Cir. 2012).

[45] Id. at 979; United States v. Schneider, ___ F.3d ___, 2012 WL 1868645, at *5 (11th Cir., May 24, 2012).

[46] Id.

lot.[47] In that respect, the crime is much like burglary, where if the victim perceives what is going on, a violent encounter is reasonably likely to ensue.[48]

We conclude that Florida robbery, both before and after Florida promulgated the "robbery by sudden snatching" statute, qualifies as a violent felony under the Armed Career Criminal Act.

AFFIRMED.

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[47] McCloud v. State, 335 So. 2d 257, 258 (Fla. 1976).

[48] "The main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate." James, 550 U.S. at 203, 127 S. Ct. at 1594.

APPENDIX "D"

defendant to place fear in the victim of a robbery other than by threatening physical harm. We cannot think of any other logical way for a defendant to place fear in the victim of a robbery other than by threatening physical harm."

So it seems to me they're saying fear is being -- by definition, is being imposed by a threat of harm. And I think if you read the Pitts opinion, again, which is not binding, in conjunction with the Wilkerson, the portion of Wilkerson that's still, according to the Eleventh Circuit as recently as February, is still good law, that robbery is a crime of violence, and therefore I believe the -- both of the challenged convictions do qualify, and therefore the Defendant is an armed career criminal under the guidelines

MR. LINDER: Your Honor, may I ask, because it will be an appeal, may I ask two points of clarification?

THE COURT: Yes

MR. LINDER: As to the battery statute, are you deciding under the categorical or the modified categorical approach that it's a crime of violence?

THE COURT: Well, I agree with you that it's -- under both. I think it's a crime of violence under both approaches

MR. LINDER: And then as to the robbery statute The reason I'm asking is your reference to Wilkerson-Whitson, those are cases that decided that robbery was a crime of violence under the so-called residual clause, and I believe

it's 924(e)(2)(B)(ii), whereas Pitts decides that it's a crime of violence under the elements clause of 924(e)(2)(B)(i), and I just want to be clear for the record which clause --

THE COURT: I think it meets both tests, but if it doesn't meet the -- the elements test, I think it meets the residual test

MR. LINDER: Thank you, Your Honor I just wanted to be clear for the record. Thank you

THE COURT: So anything else on those issues?

MR. BIRCH: Not on those issues, Your Honor

THE COURT: All right Are there any other issues regarding the presentence report?

MR. BIRCH: No, Your Honor

MR. LINDER: No, Your Honor

THE COURT: All right Then I'll adopt the findings of the presentence report as the -- the modified findings as the findings of the Court

All right Mr Linder, what's your position regarding sentencing?

MR. LINDER: Your Honor, I believe the correct guideline range now is 180 to 210 months' imprisonment; is that correct?

PROBATION OFFICER: Yes, correct

MR. LINDER: The Government would recommend a sentence at the low end of that range, the 180 months, Your